Supreme Court, U.S.
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No. 98-1357

In The

Supreme Court of the United States

October Term, 1998

JACK WAYNE REEVES,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
From The Texas Court Of Appeals
Tenth District

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Is the fact that a defendant refused a request from a police officer to allow a search of his residence admissible as evidence to support an inference of his guilt in the contemporaneous murder of his wife, who also resided there?

2. If such evidence should have been excluded, did the Texas Court of Appeals correctly determine its admission was harmless beyond a reasonable doubt under the record of this case?

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The State of Texas opposes the request filed by Jack Wayne Reeves for review of the decision of the Texas Court of Appeals because he was afforded due process. Petitioner's statement regarding the nature of the case and course of the proceedings is accepted as essentially correct.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

A. The evidence was admissible

The Texas Court of Appeals held the fact that Reeves had refused to permit the Arlington police to enter his home on the evening of October 12, 1994 (about 24 hours after his wife had disappeared) was not admissible into evidence. The court reasoned that the only relevant purpose of this evidence would be as inferring Reeves' guilt – that he was hiding something important. The court viewed this use of the evidence as being improperly derived from Reeves' lawful act of invoking the protection afforded by the Fourth Amendment or as a form of coerced relinquishment of his right to keep his home secure from unreasonable searches.[1]

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[1] *Cf. South Dakota v. Neville,* 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (it embodies no compulsion to accept an alternative which a government cannot demand).

Yet, just as Reeves had the right to deny inspection of his house, the police were entitled to ask for permission to search. His response to such entreaty was not illegally obtained, though it may be argued the police were exploiting their lack of legal authority to enter the house *unless* consent were obtained.[2] Although acknowledging Reeves' refusal to give consent may have been a circumstance indicating guilty knowledge or conduct on his part,[3] the court thought it was just as likely that he was merely demanding the police first obtain a warrant. The court determined it would therefore be unfair to permit the jury to draw any adverse inference and further held admission of this evidence would in effect impose a penalty for exercising a constitutional right.

This theory may be traced to *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). There, a majority of this Court first ruled that allowing any comment upon a defendant's failure to testify *at his trial* would impermissibly undermine or lessen the protection afforded by the Fifth Amendment. This rationale was

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[2] To the extent it has been held the exclusionary rule applies only where the evidence is gained through state action, it must be noted the same evidence was offered from another source. R. VI-94. *See also Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988) (taint of constitutional violation may be attenuated where same evidence is later obtained independently through activities untainted by the earlier illegality).

[3] Justice Stewart described use of this type of evidence as "an attempt by the State to recognize and articulate what it believes to be the natural probative force of certain facts" and "to shape a legal process designed to ascertain the truth". *Griffin v. California*, 380 U.S. at 622.

extended in *Miranda v. Arizona*, 384 U.S. 436, 468 n. 37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) to apply to an arrested suspect's *pre-trial* refusal to supply information shown to be within his knowledge. Even in the Fifth Amendment context, however, one's silence when **not in custody** may later be used against him. *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

Assuming exclusion of evidence of pre-trial silence represents a good policy under the Fifth Amendment, it is more difficult to say Reeves' actions or statements on October 12, 1994 were protected from use under the Fourth Amendment. That provision prohibits use of the fruits of an unreasonable search. But merely asking for permission to search is not a search, nor is it unreasonable. Nor did Reeves offer any evidence in support of his claim that there was an innocent purpose (or constitutional basis) for his denial of the officer's request. *See Doyle v. Ohio*, 426 U.S. 610, 619 fn. 10, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

The situation is thus more akin to that addressed in *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). There the court held that in the absence of a *Miranda* warning it would **not be assumed** the suspect was exercising a constitutional right, and thus the State could prove and comment upon the defendant's silence at a time an innocent person would have spoken.

More importantly, the relevance of the evidence here was not the implication that something incriminatory would have been found inside the house. Rather, the State merely sought to show the first part of a pattern of deceitful and suspicious conduct by Reeves. The State

was entitled to show that, from the start, Reeves did not react in a normal way with respect to the disappearance of his wife. This was also a "fair response" to the implications defense counsel sought to rely upon. *See United States v. Robinson*, 485 U.S. 25, 32, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988). The facts here are easily distinguished from those presented in *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978).

B. The admission of the evidence was not harmful error

In any event, the Court of Appeals did not misconstrue or misapply the doctrine of harmless error. It correctly concluded that in the setting of this case the error was "so unimportant and insignificant" it did not require reversal of the conviction. *See Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Since the admission of this evidence was trial error, a qualitative assessment of its impact "in the context of the other evidence presented" was called for. *Arizona v. Fulminante*, 499 U.S. 279, 307-8, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

"This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-7, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). The mere fact this Court might have hesitated to draw the same conclusion as made below should not lead it to overrule the conscientious decision of the Court of

Appeals upon what must be a fairly doubtful point. *Milwaukee Electric R. & Light Co. v. Wisconsin ex rel. Milwaukee*, 252 U.S. 100, 103, 40 S.Ct. 306, 64 L.Ed. 476 (1920). The State of Texas would hope that this Court is "not prepared to differ" with this aspect of the decision below. See *Chambers v. Maroney*, 399 U.S. 42, 53, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

CONCLUSION

While this case presents an interesting issue which may some day need to be decided by this Court, the Texas Court of Appeals meticulously reviewed the facts and applied correct legal standards in determining there was no harmful error under the record here. Review should thus be denied. In any event, the judgment of the lower courts must be affirmed.

Respectfully submitted,

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